Supreme Court, U.S.
FILED
JAN 8 1998
CLERK

No. 97-782

In The

Supreme Court of the United States

October Term, 1997

BRENT BEALS,

Petitioner,

v.

KIEWIT PACIFIC COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KOBAYASHI, SUGITA & GODA

ERNEST H. NOMURA*
CHARLES W. GALL
999 Bishop Street, Suite 2600
First Hawaiian Center
Honolulu, Hawaii 96813
(808) 539-8700

Counsel for Respondent
** Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly held that an employee whose employment was covered under the terms of a collective bargaining agreement could not assert a breach of contract claim based on Hawaii state law against his former employer because Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), preempts such a claim, as adjudication of the claim substantially depended on an interpretation of the collective bargaining agreement and the contract upon which the employee based his claim was subsumed by the collective bargaining agreement.

LIST OF INTERESTED PARTIES

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Kiewit Pacific Co. discloses as follows: Respondent Kiewit Pacific Co.'s parent company is Kiewit Construction Company. Respondent Kiewit Pacific Co. does not have any nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 3

I. SUMMARY OF ARGUMENT 3

II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS 4

III. THERE IS NO "CONFLICT AMONG THE CIRCUITS" ON WHETHER CLAIMS SUCH AS PETITIONER'S ARE PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT 10

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)..... 7

Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987) 10, 11, 13, 15, 16

B.F. Goodrich Co., 115 N.L.R.B. 722 (1956)..... 1

Beals v. Kiewit Pacific Co., 114 F.3d 892 (9th Cir. 1997)..... 1, 3, 10, 13, 15, 20

Berda v. CBS, Inc., 881 F.2d 20 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990)..... 10, 11, 12, 13

Calleon v. Miyagi, 76 Haw. 310, 876 P.2d 1278 (Haw. 1994)..... 7

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) .. *passim*

Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443 (1980)..... 5

Darden v. U.S. Steel Corp., 830 F.2d 1116 (11th Cir. 1987).....18, 20

Eitmann v. New Orleans Pub. Serv., Inc., 730 F.2d 359 (5th Cir. 1984), *reh'g denied*, 738 F.2d 437, *cert. denied*, 469 U.S. 1018 (1984)..... 16, 17, 18, 19

J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)....8, 9, 13, 15

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988)..... 6

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981)..... 1

Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311 (1981)..... 5, 6, 7

TABLE OF AUTHORITIES – Continued

Page

United Steelworkers of America v. American Mfg. Co., 363 U.S. 1031 (1960) 7

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 7

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 8

Vieira v. Robert's Hawaii Tours, Inc., 2 Haw. App. 237, 630 P.2d 120 (1981) 6

White v. National Steel Corp., 938 F.2d 474 (4th Cir. 1991), *cert. denied*, 502 U.S. 974 (1991) 16

STATUTES

29 U.S.C. § 185(a) ..... i, 3

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 29.6 ii

Rule 30.4 1

JURISDICTION

This case was docketed on November 10, 1997. Pursuant to Rule 30.4 of the Rules of the Supreme Court of the United States ("Rules"), an application to extend time to file this Brief in Opposition and other documents under the Rules was made on December 2, 1997. The Clerk of the Court extended the time to file the Brief in Opposition and other documents under the Rules until January 9, 1998. The Brief in Opposition, accordingly, is timely filed.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set forth in the United States Court of Appeals for the Ninth Circuit's opinion. *Beals v. Kiewit Pacific Co.*, 114 F.3d 892 (9th Cir. 1997). Respondent, however, disputes the following additional "facts" that are set forth in Petitioner's Petition for Writ of Certiorari ("Petition"). In particular, the additional "facts" are irrelevant to the Court's consideration of the issue involved in this case.

1. Whether the collective bargaining agreement ("CBA") excluded from its scope of coverage certain "confidential employees" is irrelevant. *See* Petition at 6. Petitioner appears to make much of the disputed fact that he was told to keep the terms of the "move letter" "confidential," and that this request made him a "confidential employee." Petitioner is wrong and he was never a "confidential employee" who was excluded from coverage under the CBA. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981); *B.F. Goodrich Co.*,

115 N.L.R.B. 722 (1956) (defining "confidential employees" as persons "who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations").

2. The CBA did not provide "less favorable terms" than the "move letter." Petition at 6. In fact, the CBA provided significantly more benefits and protections to covered employees like Petitioner, such as employer contributions to the various multiemployer benefit and pension plans, hours of work, overtime, holidays, job referrals and job placement, and, of course, the grievance and arbitration mechanism to resolve disputes such as those involved in this case. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 15-17, 21-25, 29, 41-42; Defendant Kiewit Pacific Co.'s Motion for Summary Judgment, filed December 17, 1991, Appendix "A" at 10-16.

3. Petitioner was not placed in a position that was not covered by the CBA. Petition at 7. At all times during his employment he was in a position that was covered by the Operating Engineers' CBA. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 148-153; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 87-88, 93-94, 114.

ARGUMENT

I. Summary of Argument

Petitioner frames the issue before the Court as being whether the preemption analysis in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), requires the reversal of the Ninth Circuit's opinion that Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) ("§ 301"), preempts a state law contract claim when the alleged independent employment contract is breached and the employee's job is covered by a CBA. Petitioner misstates the United States Court of Appeals for the Ninth Circuit's holding. Instead, the Ninth Circuit, consistent with this Court's decisions, correctly held that Petitioner's state contract claim was preempted by § 301 because his claim substantially depended on an interpretation of the CBA and the "independent agreement" that Petitioner sought to enforce against Respondent was subsumed by the labor agreement. *Beals*, 114 F.3d at 894.

The Ninth Circuit's opinion is consistent with this Court's decisions and with the decisions of the Courts of Appeals for other circuits. The cases upon which Petitioner relies to establish a "conflict among the circuits" are factually distinguishable and, accordingly, reliance on these cases is misplaced. There is no basis for this Court to grant certiorari review.

II. The United States Court Of Appeals For The Ninth Circuit's Decision Is Consistent With This Court's Decisions.

Petitioner relies solely on the *Caterpillar* decision to support his argument that the Ninth Circuit's decision in this case should be reviewed on certiorari. However, there is no basis to grant certiorari because the Ninth Circuit correctly concluded that this case and *Caterpillar* are factually dissimilar and that the holding in *Caterpillar* is not controlling. *Beals*, 114 F.3d at 894-95.

In *Caterpillar*, at the time that the employer made promises of long-term managerial employment to the aggrieved employees, the employees were not covered by a CBA; they were managerial employees who were not members of a recognized bargaining unit and whose positions were not covered by the CBA. *Caterpillar*, 482 U.S. at 388. The employer subsequently downgraded the employees to positions that were covered by the CBA and eventually laid them off. *Id.*

After their employment terminations, the employees sought to enforce in California state court the employer's oral and written representations to each of them that they as managerial employees could look forward to "indefinite and lasting employment with the corporation and that they could count on the corporation to take care of them." *Id.* at 389 (citations and quotation marks omitted). Under California law, such affirmative representations and promises are enforceable against the employer. *Id.* at 389, n.2.

The critical question before the Court was "whether [the employees'] state-law complaint for breach of individual employment contracts [was] completely pre-empted by § 301 of the Labor Management Relations Act, . . . and therefore removable to Federal District Court." *Id.* at 388. The Court's primary concern was the preemptive scope of § 301 so as to give rise to removal jurisdiction.

In analyzing the "complete preemption" issue, the Court focused on, among other things, whether a defendant could remove a case to federal court based on the assertion of a federal defense. *Id.* at 393. The Court held that "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Id.* at 399. The Court concluded that because adjudication of the state contract claim did not require interpretation of the CBA, and because the rights that the employees were seeking to vindicate were independent of any CBA, there was no basis to invoke the "complete preemption" doctrine so as to give rise to federal removal jurisdiction. *Id.*

The Court noted that adjudication of the employees' state "implied contract of employment" claim, predicated on *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327-329 (1981), and *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455-456 (1980), did not require interpretation of the CBA. Under *Pugh* and *Cleary*, the trier of fact, when faced with a California state law "implied contract of employment" claim, would have to examine a "combination of factors, including longevity of service,

commendations and promotions, oral and written assurances of stable and continuous employment, and an employer's personnel practices." *Caterpillar*, 482 U.S. at 389, n.2. Consideration of the *Pugh* "factors" was independent of any provision of the CBA and did not "substantially depend" on an interpretation of the CBA, as the representations related to management positions not covered by the CBA.

In contrast, the factual and legal issues presented in this case are markedly different from the issues that were addressed in *Caterpillar*. Here, the adjudication of Petitioner's state contract claim is substantially dependent on an interpretation of the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). Petitioner sought to enforce an alleged express contract of employment for a definite duration. Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 143. Under Hawaii law, a contract of employment for a definite duration can only be terminated "for cause." *See Vieira v. Robert's Hawaii Tours, Inc.*, 2 Haw. App. 237, 630 P.2d 120 (1981). Pursuant to the CBA at issue, Respondent had the right to terminate covered employees like Petitioner for "just cause" and/or for "lack of work." Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 11, 29. Accordingly, whether or not Petitioner articulated a cognizable and viable claim for breach of the "move letter" would require the trier of fact to interpret the CBA's "just cause/lack of work" provision in order to determine whether a breach of the "move letter" occurred in the first instance.

This Court has consistently held that in the context of federal labor law, the arbitrator appointed by labor and

management under the grievance procedures set forth in a CBA has the power and authority to interpret and apply the terms of that agreement, including the issue of whether "just cause" exists to terminate a covered employee's employment consistent with the terms of the CBA. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 1031 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Here, consistent with the decisions of this Court, the Ninth Circuit correctly concluded that adjudication of Petitioner's state contract claim substantially depended on an interpretation of the CBA, and accordingly, was preempted by § 301. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

Furthermore, the "implied contract of employment" claim at issue in *Caterpillar* required consideration of the *Pugh* factors to determine whether the aggrieved employees asserted a cognizable claim under California law. Adjudication of the *Pugh* factors in *Caterpillar* did not require an interpretation of the CBA at issue in that case, and consideration of such factors was held to be independent of the CBA, as the representations related to positions that were not covered by the CBA. Here, on the other hand, Petitioner did not assert an "implied contract of employment" claim predicated on the *Pugh* factors. Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 143. Indeed, the Hawaii Supreme Court has refused to recognize such an "implied contract of employment" claim based on *Pugh*. *Calleon v. Miyagi*, 76 Haw. 310, 876 P.2d 1278 (Haw. 1994). Instead, Petitioner asserted a breach of an express contract of employment for a definite duration, which required proof

that Respondent articulated reason to terminate Petitioner did not constitute "just cause." This is precisely the kind of issue that the arbitrator appointed pursuant to the grievance procedures of the CBA has the specialized knowledge, experience, and competence to adjudicate, and which requires an interpretation of the CBA. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Finally, Petitioner argues that the Ninth Circuit erred in concluding that the "move letter" was "subsumed" by the CBA. *See* Petition at 16-17. Respondent recognizes this Court's lesson in *Caterpillar* that "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law." *Caterpillar* 482 U.S. at 396, discussing *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). However, in this case, the "move letter," contrary to Petitioner's unsupported and conclusory factual statement that the "move letter" was "more advantageous" than the CBA, in fact "subtracted from" the rights and obligations under the CBA.

For example, the "move letter" does not address the requirement that all employers-signatories to the CBA must make contributions on behalf of covered employees like Petitioner to the various multiemployer plans, such as the Hawaii Health and Welfare Trust Fund for Operating Engineers, the Operating Engineers' Pension Trust Fund, the Pensioned Operating Engineers' Health and Welfare Trust Funds, the Hawaii Operating Engineers' Annuity Trust Fund, and the Operating Engineers' Vacation and Holiday Pay Plan. Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 17-18.

Likewise, the "move letter" was silent as to the "Referral, Hiring and Employment" mechanism to ensure job placement and job referrals for terminated and/or laid-off Operating Engineers like Petitioner; the hours and overtime provisions and benefits (including meal periods, two-shift and three-shift operations and night work hours and benefits); and holidays. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 15-17, 21-25, 29, 41-42; Defendant Kiewit Pacific Co.'s Motion for Summary Judgment, filed December 17, 1991, Appendix "A" at 10-16. In addition, the "move letter" and the CBA contain inconsistent provisions regarding "subsistence and travel pay." *Compare* Section 18 of the CBA (Defendant Kiewit Pacific Co.'s Motion for Summary Judgment, filed December 17, 1991, Appendix "A" at 28-29) and Paragraph 2 of the Move Letter (Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94). Certainly, the "move letter" is silent as to the grievance mechanisms and procedural safeguards as provided in the CBA. Petitioner's Excerpts of Record on Appeal to Ninth Circuit at 94; Respondent's Supplemental Excerpts of Record on Appeal to Ninth Circuit at 21-25.

The Court instructed long ago in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944):

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a

> duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective bargaining agreement . . . Individual contracts cannot subtract from collective ones. . . .

Id. at 337, 339. *See also Caterpillar*, 482 U.S. at 396.

In his Petition, Petitioner has not provided any meritorious analysis or argument based on this Court's prior decisions so as to justify the Court's exercise of its discretionary certiorari review power. The Ninth Circuit's decision in this case is entirely consistent with the Court's federal labor law jurisprudence. Certiorari review, accordingly, should be rejected.

III. There Is No "Conflict Among The Circuits" On Whether Claims Such As Petitioner's Are Preempted By The Labor Management Relations Act.

Petitioner is incorrect in arguing that the Ninth Circuit's decision is in conflict with decisions from the Third and Eighth Circuits. Petitioner relies on *Berda v. CBS, Inc.*, 881 F.2d 20 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990), and *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987), to support his argument. Both of these cases involve facts that are distinguishable from the facts in this case, and, as a result, require a different outcome from that of the Ninth Circuit's decision in *Beals*. In both *Berda* and *Anderson*, the employees sought to enforce narrow and limited pre-hire agreements that specifically addressed only the duration

or permanency of employment. Under these circumstances, the *Berda* and *Anderson* courts held that no interpretation of the CBA was necessary because the pre-hire agreements that were being enforced were of such limited and specific scope (relating only to the duration or permanency of employment) that there was no sufficient overlap with the CBA to require the CBA to be interpreted in order to determine the rights under the pre-hire agreements. In contrast, the "move letter" that Petitioner sought to enforce against Respondent addressed numerous different terms and conditions of employment, many of which were also covered by the CBA (if not inconsistent with the CBA) and was, therefore, so broad and overlapping with the CBA that enforcement of it was substantially dependent on an interpretation of the labor agreement.

In *Berda*, the aggrieved employee asserted that during a pre-employment meeting, the employer orally "guaranteed employment . . . for the reasonably foreseeable future, and that any job offered to him would . . . be a permanent position." *Id.* at 21. After accepting employment with the employer, the employee "was laid off as a part of a company-wide reduction in force." *Id.*

After being laid off, the employee filed a complaint in state court alleging, among other things, breach of an implied contract of employment/promissory estoppel. *Id.* The breach of an implied contract of employment/promissory estoppel claim was based on the alleged oral statement made during the pre-employment meeting on which the employee detrimentally relied. The employee claimed that when the statement was made at the meeting, the employer knew or should have known that the

company would be "conduct[ing] extensive layoffs in the department and division . . . in which he was eventually offered employment." *Id.*

In concluding that § 301 did not preempt the employee's implied contract/promissory estoppel claim, the *Berda* court noted that the employee's state law claim did not substantially depend on an interpretation of any provision in the CBA. *Id.* at 26. Indeed, no interpretation of the CBA was necessary because the agreement sought to be enforced was a specific and narrow promise related to the duration of employment. The "independent agreement" was not a broad agreement with substantial overlap with the CBA. In fact, the Third Circuit observed that in order to prove his breach of the implied contract of employment/promissory estoppel claim, the employee only needed to prove (1) that the representations that he would not be laid off were made, (2) that he relied on such representations, and (3) that the employer breached its promise when it laid the employee off. *Id.* at 25.

The *Berda* court critically commented that the employer's only defense to the employee's implied contract of employment/promissory estoppel claim was that alleged representations "related to" the "basic terms and conditions of [the employee's] employment," and that the alleged representations were "inconsistent with" the seniority and layoff provisions of the CBA. *Id.* Under these circumstances, the *Berda* court concluded that the employee's implied contract of employment/promissory estoppel claim did not require interpretation of any provision of the CBA and, accordingly, was not preempted by § 301.

In *Beals*, Petitioner did not assert an "implied contract of employment" or a "promissory estoppel" claim predicated on representations that were "independent" of the CBA. Petitioner's state law claim sounding in an alleged breach of an express contract of employment for a definite duration required consideration of the critical factual issue that Respondent did not have "just cause" to terminate him consistent with the CBA. Hence, adjudication of Petitioner's contract claim was substantially dependent on an interpretation of a fundamental provision set forth in the CBA. Furthermore, the terms and conditions of employment that Petitioner sought to enforce against Respondent as set forth in the "move letter" were far broader than the terms and conditions of employment that the employee in *Berda* was seeking to enforce against his employer. Adjudication of Petitioner's contract claim based on the "move letter," accordingly, required interpretation of the CBA and its provisions as it related to the provisions set forth in the "move letter."

Moreover, unlike *Berda*, where the alleged representations and promises were held to be "advantageous" to the employee, here, as discussed above, the "move letter" is silent as to crucial collective benefits, safeguards, and protections as provided in the CBA. As such, and consistent with *J.I. Case* and *Caterpillar*, the "move letter" was subsumed by the CBA, and any contract claim predicated on the "move letter" is preempted by federal labor law. The Ninth Circuit was correct in so concluding.

Petitioner also points to the Eighth Circuit's decision, *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987), a two-to-one decision

that was decided *prior to Caterpillar*, to support his argument that there is a "conflict" among the federal appellate courts. Reliance on *Anderson* is misplaced. The employer in *Anderson*, pursuant to the CBA, began to hire laid-off employees from a preferential hiring list in order to meet an increase in production requirements. *Id.* at 954. In addition, the employer began to contact former employees who had been laid off three years earlier, but whose recall rights had expired given the length of time that they had been on layoff. *Id.* These employees were employed as new hires and placed on a 90-day probationary period consistent with the CBA in place with the union.

The probationary employees alleged that when they were contacted by the employer, the employer promised them that they would be hired as "permanent employees." *Id.* at 955. However, prior to the expiration of the probationary period, the employees "were 'bumped' from their jobs by employees from the preferential hiring list." *Id.* at 954-55. The probationary employees asserted state tort and contract claims against the employer. The employer removed the case to federal court based on the "complete preemption" doctrine, and successfully dismissed the probationary employees' complaint.

The Eighth Circuit reversed and concluded that because the probationary employees' contractual and quasi-contractual claims did not "originate in, nor refer in any substantial way to, the rights and duties established in the collective bargaining agreement," their state law claims were not preempted under § 301. *Id.* at 958. The *Anderson* court's decision is consistent with and dictated

by the limited and specific nature of the pre-hire agreement that the employees were seeking to enforce, which only addressed the permanency or duration of their employment. The *Anderson* court cited to *J.I. Case* in a footnote, and concluded that "individual contracts" that "[are] separate and distinct from a collective bargaining agreement can create legally enforceable rights and obligations." *Id.* at 958, n.7, citing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336. Given the narrow breadth of the "contract" that the employees were seeking to enforce against the employer – the "permanent" duration of their employment – the *Anderson* court properly concluded that the rights that the employees were seeking to enforce against the employer did not require interpretation of the CBA, nor were such promises "subsumed" by the CBA.

On the other hand, in *Beals*, Petitioner sought to enforce the terms of the "move letter" that broadly addressed conditions of employment with Respondent, many of which were covered by, and, in some instances, were inconsistent with the CBA. The position for which Respondent hired Petitioner was a position that was covered by the CBA, and his employment terms and conditions were governed by the CBA at all times. As such, and given the breadth and overlap between the terms of the "move letter" and the CBA, the Ninth Circuit properly found that the "contractual rights" that Petitioner sought to enforce were substantially dependent on an interpretation of the CBA to determine whether or not his contract claim was cognizable and viable under Hawaii law. Moreover, as discussed above, under *J.I. Case*, the terms of the "move letter" significantly "subtracted from" the rights and obligations under the CBA and, in fact,

were inconsistent with the CBA. Thus, the Ninth Circuit was entirely correct in preempting Petitioner's state contract claim, and the Ninth Circuit's decision is consistent with the *Anderson* decision.

Finally, Petitioner identifies *White v. National Steel Corp.*, 938 F.2d 474 (4th Cir. 1991), *cert. denied*, 502 U.S. 974 (1991), as being "in substantial conflict with the Ninth Circuit's decision in the instant case." However, *White* is easily distinguishable from the instant case and is based on facts that are completely different from those presented in this case. The "independent contracts of employment" that the employees in *White* were seeking to enforce were management contracts: "The promises plaintiffs seek to enforce are those that [the employer] made to them in negotiations over the terms of employment in management positions." *Id.* at 483. As such, the employees "were not in positions covered by a collective agreement," and therefore, adjudication of their state contract claims did not substantially depend on an interpretation of the CBA. *Id.* at 484. Because the employees in *White* were hired for positions not covered by the CBA, no interpretation of the CBA could even be relevant. *White*, accordingly, does not support Petitioner's argument at all. Indeed, *White* is consistent with the Ninth Circuit's application of *Caterpillar* in this case.

The Ninth Circuit's decision in the instant case is also consistent with the Fifth Circuit and the Eleventh Circuit's decisions. In *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984), *reh'g denied*, 738 F.2d 437, *cert. denied*, 469 U.S. 1018 (1984), the Fifth Circuit analyzed an aggrieved employee's state contract claim that is factually similar to Petitioner's. In *Eitmann*, prior

to being hired, the employee alleged that the employer "promised to keep [the employee] on the payroll at full compensation in the event of a disabling work-related injury." *Id.* at 361. During his employment, the employee was injured several times on the job. *Id.* After his latest injury, the employer terminated him, "advising him that it had no suitable work available that he was capable of performing." *Id.* "At all times during his employment . . . , [the employee] was a member of [a union] which maintained a collective bargaining agreement with [the employer]." *Id.*

The CBA in *Eitmann* contained provisions for the discharge of employees. *Id.* at 360-61. Further, the labor agreement contained provisions for the handling of grievances. *Id.* at 361. Notwithstanding these provisions in the CBA, the employee filed a breach of contract claim in state court based on the employer's alleged promise of continued employment. In response, the employer asserted that the employee's claim arose under § 301 of the LMRA, removed the action to federal district court, and successfully had the case dismissed after moving for summary judgment on the ground that the state contract claim was completely preempted by § 301. *Id.*

On appeal, the Fifth Circuit noted that the employee's breach of contract claim, "on its face, [did] not invoke the collective bargaining agreement." *Id.* at 362. However, the court observed that it was not convinced "that the two agreements [could] be construed so independently of each other," especially since the alleged oral contract essentially provided

> for lifetime employment, regardless of [the employee's] ability to perform any services for the employer; in other words, unlike all of the other employees covered by the collective bargaining agreement, [the employee] could not be discharged because of his physical inability to perform any services for [the employer]."

Id. at 362-63. The court concluded that the alleged oral contract clearly sought to "limit or condition the terms of the CBA, which established the terms and conditions of employment, including discharge," and thus held that the employee's breach of contract "action is necessarily preempted by § 301." *Id.* at 364.

Here, as in *Eitmann*, Petitioner alleged that prior to being hired, Respondent promised him employment in a covered position that would last two years. At all times during his employment with Respondent, Petitioner was a member of the Operating Engineers' union. As with the employee's claim in *Eitmann*, Petitioner's claim, "on its face, [did] not invoke the collective bargaining agreement." *Id.* at 362. Furthermore, as in *Eitmann*, Petitioner asserted that he was promised employment for a definite duration and that he would remain so employed regardless of the discharge provisions under the terms of the CBA. Under these circumstances, accordingly, the Ninth Circuit, consistent with *Eitmann*, was correct in preempting Petitioner's contract claim.

Likewise, the Eleventh Circuit's decision in *Darden v. U.S. Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987), is also in agreement with the Ninth Circuit's decision in the instant case. The employees in *Darden* were previously laid off employees who had been recalled for employment. *Id.* at

1117-18. The employees claimed that at the time of their recall interview, agents of the employer induced them to take jobs with the company by making statements to the effect that the employer had enough work to guarantee their employment for at least ten years. *Id.* Thus, when the employees were laid off three years after being rehired, they asserted claims against the employer for breach of an oral employment agreement for definite duration and fraudulent misrepresentation in state court. The cases were removed to federal district court where summary judgment was granted in favor of the employer. *Id.*

During their employment, the employees were covered by a comprehensive labor agreement that "govern[ed] such subjects as rates of pay, hours of work, seniority, layoffs, reductions in force, terminations, severance pay, complaints, grievances and arbitration." *Id.* Additionally, the labor agreement included a mandatory grievance and arbitration procedure to settle disputes between the employees and the company. *Id.*

On appeal, the Eleventh Circuit noted that:

> [W]hile individual contracts between employer and employee are not precluded by the existence of a collective bargaining agreement, to the extent that an individual contract and a collective bargaining agreement are inconsistent, the latter must prevail.

Id. at 1120 (citing *Eitmann*, 730 F.2d at 362). Accordingly, the Eleventh Circuit affirmed the judgment of the district court in dismissing the employees' complaint.

Here, as in *Darden*, Petitioner was covered by a comprehensive labor agreement that detailed such subjects as rates of pay, hours of work, seniority, layoffs, reductions in force, multiemployer plan contributions, terminations, grievances and arbitration. As in *Darden*, the "independent agreement" that Petitioner sought to enforce was inconsistent with, indeed, "subtracted from" the labor agreement. Consistent with this Court's decisions and the Eleventh Circuit's decision in *Darden*, the Ninth Circuit here, under these similar circumstances, correctly concluded that "the CBA controls." *Beals*, 114 F.3d at 894.

CONCLUSION

Certiorari review of this case is not warranted and should be rejected. The Petition for a Writ of Certiorari does not present a substantial and unique issue in federal labor law that requires this Court's guidance and clarification. The Ninth Circuit's decision properly followed *Caterpillar* and *J.I. Case*, which provide clear guidance regarding preemption under § 301 when adjudication of the state contract claim substantially depends on an interpretation of the CBA and the contract upon which an employee bases his claim is subsumed by the CBA. Further, the Ninth Circuit's decision in this case is consistent with the Third and Eighth Circuits' decisions, as these cases are factually dissimilar.

The Court should, accordingly, deny the Petition for a Writ of Certiorari. January 8, 1998.

Respectfully submitted,

ERNEST H. NOMURA*
CHARLES W. GALL
KOBAYASHI, SUGITA & GODA
999 Bishop Street, Suite 2600
First Hawaiian Center
Honolulu, Hawaii 96813
(808) 539-8700

Counsel for Respondent
* *Counsel of Record*